IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL APPEAL NO.664 OF 1994

1. Vijay @ Jafraya Bhimsha @ Balu
Pawar @ Bhosale @ Kale

2. Laxman @ Saikalya Shankar Kale

3. Prabhu Laxman Kale — Appellants (Org.Accused)

Vs.

The State of Maharashtra — Respondent

Mr.S.C.Halli for appellants.
Mr.A.M.Shringarpure, APP for State.

CORAM: S.S.PARKAR & ANOOP V.MOHTA,JJ.
January 11 & 12, 2005.

ORAL JUDGMENT (PER S.S.PARKAR,J.)

1. This appeal is filed by the convicted accused challenging the judgment and order dated 15/12/1994 delivered by the 3rd Addl. Sessions Judge, Solapur in Sessions Case No.150 of 1993 convicting the appellants for offence under Section 302 read with Section 149 of IPC and sentencing each of them to life imprisonment and to pay a fine of Rs.10,000/- in default RI for five years. The appellants were also convicted for offences under Sections 147, 148, 326, 504 and 506 of IPC but no separate sentences were awarded on those counts.

2. The prosecution case briefly narrated is as follows:

. The incident of assault had taken place on 29th January 1992 between 10 and 11 p.m. in the land of Shivaji Waghmare PW 4 bearing Gat No.138 situated on the outskirts of village Khanapur in Taluka Akkalkot, Dist.Solapur. Both the injured as well as the accused belong to Pardhi community. According to the prosecution case Kallappa, the elder brother of the complainant Basu had married Kasturbai PW 20. Kallappa was killed by accused no.1 and thereafter his wife Kasturbai PW 20 was kidnapped by him. One Bigulya the absconding accused had wanted to marry Chhaya but the complainant and his brother had refused to get her married to Bigulya and instead got her married to Bhimsha. The accused had, therefore, borne grudge against the complainant's side and had gone to the aforesaid field on the night of the incident armed with weapons like axes, sickles and sticks. The accused were six in number. On the night of the incident the complainant and the victims had halted in the aforesaid field. When the complainant and victims after taking their dinner had

gone to sleep in the field which was an open place, the accused went there and started assaulting the victims and in the process killed five persons. Out of the five victims, three victims Vimalabai, Shantabai, Gangaram and an eight days' old child had died on the spot while Pakshibai was removed to the hospital in a serious condition where she succumbed to the injuries on the following day. Thus the persons who were murdered on that night were three ladies, one eight days' old child and Gangaram, husband of deceased Vimalabai. Eight days' old child was son of Vimalabai and Gangaram. Besides the aforesaid five casualties which took place in the said incident some other witnesses were injured. At the time of incident when the assault was taking place complainant Basu escaped from the field and went to the adjoining village Khanapur seeking help of the villagers to save his family members from the attack of the assailants but the villagers including Shivaji Waghmare, the owner of the land in question did not dare to accompany the complainant to rescue his relations from assault by the accused persons. He, therefore, went to the police outpost Karajgi to lodge his complaint. The Head Constable there informed the Akkalkot Police Station on telephone

about the incident.

3. On receiving telephone message PSI Gaikwad from Akkalkot Police Station went to the place of incident. As the complainant was not there, he posted constables at the place of incident and himself went to the outpost and recorded the complaint of PW 16 Basu. He forwarded the said complaint to Akkalkot Police Station where the crime was registered for offences of rioting, assault and murder. He then proceeded to the place of offence and drew the spot panchanama as well as inquest panchanamas of the dead bodies. Pakshibai, who was in serious condition, was removed to Karajgi from where she was shifted to civil hospital, Solapur where she succumbed to her injuries. The autopsies were performed on the dead bodies and thereafter the bodies were handed over to the complainant for obsequial rites. The statements of the injured eye witnesses were recorded on the following morning i.e. 30th January 1992. The blood stained clothes of the deceased as well as the injured were seized under panchanama and were sent to the office of CA. The search was made for the accused but they were not

available for their arrest even in the village where they were residing. The accused no.1 was resident of Sidhapur, taluka Mangawedha and accused nos.2 and 3 were residents of village Borale, taluka Mangalwedha. Accused no.1 was arrested on 6/2/1993 in taluka Jat of Sangli District and thereafter his custody was transferred to the concerned police station for this offence. The charge-sheet was filed against accused no.1 in the month of May 1993. Accused nos.2 and 3 were arrested on 27th February 1994 in village Donaj and thereafter supplementary charge-sheet was filed against them. The other three accused by name Bigulya, Disha and Paplya could not be traced and, therefore, they were shown absconding. After their arrest blood of accused nos.1, 2 and 3 was also collected and sent for CA examination. After completion of the investigation against these three appellants charge-sheet was filed and the case was committed to the Sessions Court, Solapur.

4. Before the Sessions Court charges were framed against all the three appellants for offences under Sections 147, 148 and 302, 326, 504 and 506 read with Section 149 of IPC to which the

appellants-accused pleaded not guilty. On behalf of the prosecution 25 witnesses have been examined. The said witnesses include five eye witnesses to the incident some of whom were injured at the time of the incident. They are PW Nos.16 to 20. PW 20 Kasturbai, wife of accused no.1, had however turned hostile. The other witnesses are the villagers including PW 4 Shivaji Waghmare who was the owner of the land in which the incident had taken place. The villagers who were examined are PWs 4 to 9 some of whom had turned hostile. The prosecution had also produced the map of scene of offence prepared by the Circle Officer PW 1 Mohamad Ali Shaikh at Exhibit 24 and examined the police witnesses including the Investigating Officers and had produced CA reports, and the panchanamas. The defence of the accused was of denial.

5. After considering the entire evidence on record the trial Court by the impugned judgment and order dated 15/12/1994 had convicted and sentenced the appellants as stated above. The said order of conviction and sentence is under challenge in this appeal filed by the appellants.

6. Mr.Halli appearing for the appellants firstly contended that the prosecution has not proved the motive. He also contended that due to the previous enmity between the two groups the accused were falsely implicated. He then argued that specific role has not been attributed to the accused and except the accused having been named in the complaint and the statements of the witnesses, no other circumstance is brought on record which connects the accused with the crime in question. He also argued that the prosecution has not proved that the accused were absconding as the details of the steps taken by the police to trace the accused have not been brought on record. He then contended that the prosecution has also not proved that there were street lights nor the torch has been seized by the police to show that accused were seen by the witnesses in the street light or torch light. According to him when the incident had taken place in the night the assailants could not be identified by the witnesses and, therefore, the accused were implicated falsely due to the previous enmity.

7. With the assistance of the defence Advocate we have gone through the entire evidence on record of all the prosecution witnesses including those who had turned hostile. After going through the evidence on record we find that there are injured eye witnesses who could identify the accused who were named in the complaint as well as in the statements of the witnesses. Since the accused were known to the witnesses it was not difficult for them to identify them even during night as the incident had taken place in the open field and the assailants could be identified in an open place even in the night assuming that there was no light or even moon light on that night. The complainant has mentioned in the FIR itself the names of the assailants and the weapons carried by them which were seized from the place of offence. The evidence of the eye witnesses is supported by the spot panchanama and the medical evidence. The complainant had escaped from the place of incident when the assault commenced and went to the village for seeking help from the villagers and as no villager came to his help, he went to the police outpost early morning even before sunrise where his complaint was lodged in which he has named the appellants and absconding accused and the weapons

wielded by them. The accused including the appellants were absconding for a long time. As stated earlier, accused no.1 was arrested on 6th February 1993 i.e. about more than one year after the incident in question and accused nos.2 and 3 were arrested on 27th February 1994 i.e. more than two years after the date of incident. During that period they were not found in the villages of which they were normal residents. While accused no.1 was arrested in Sangli district, accused nos.2 and 3 were also arrested in a different village by name Donaj. Three other accused were absconding until the trial took place against these appellants.

8. In this case there are five eye witnesses to the incident of assault being PWs 16 to 20 out of whom one witness PW 20 Kasturbai, wife of accused no.1, had turned hostile. Out of the four remaining eye witnesses at least two are injured eye witnesses. The complaint was lodged by PW 16 Basu Bhosale whose sisters Pakshibai and Vimalabai were murdered in the incident. The other victims are complainant's mother Shantabai, his sister Vimalabai's husband Gangaram and her eight days' old son. Even Chhaya, who is the

injured eye witness and who was not given in marriage to one of the absconding accused Bigulya, is the sister of the complainant. The complainant has deposed that on the night of the incident they had gone to sleep after their dinner in the open field. At about 11 p.m. train had arrived and made a halt near the said field. At that time accused persons came to their field with axes, sickles, jambiya and sticks in their hands. The accused started assaulting the complainant and his wife. He identified the accused nos.1, 2 and 3 and fled along with his wife towards village Khanapur for seeking help of the villagers to rescue the other members of the family who were being assaulted. Thereafter they went to village Ankalgi but there also nobody came forward to help them. He then came back to the place of incident to find that Vimalabai, her newly born son, her husband Gangaram and Shantabai were murdered and Pakshibai was seriously injured. Other relations, Ganappa, Bhagabai and Chhayabai were also seriously injured. He, therefore, went to the police outpost Karajgi and lodged his complaint (Exh.58). Thereafter the injured persons were taken to the Primary Health Centre, Karajgi for medical treatment. He has identified the muddemal article nos.1 to 6

which consist of two axes, two sickles and two sticks as the weapons which were wielded by the appellants and the three absconding accused. Pakshibai later on died in Civil Hospital, Solapur. He has also deposed about the previous enmity with the accused persons as his sister Chhaya was not given in marriage to Bigulya, one of the absconding accused and, therefore, the accused had borne grudge against him. He has also deposed about the murder of his elder brother Kallappa at the hands of accused no.1 and absconding accused Bigulya and others who had kidnapped his wife Kasturbai/Kerubai PW 20. He has stated that for passing the night they had halted in the field of Shivaji Vitthal Waghmare on the previous day.

9. His evidence has been criticized on the ground that though he has deposed that he was assaulted initially by accused no.1, he had not been examined by the doctor and no injury certificate is produced. The witness himself has not stated that he had received any injuries on his person. He has deposed that initially he was assaulted and, therefore, he along with his wife went into the ditch

to avoid the assault and thereafter ran away from that place and went to the village when others were being assaulted. He is not the sole eye witness to the incident but his evidence has been corroborated by the FIR (Exh.58) lodged by him immediately after the incident where he has named all the six accused persons for having come to the said field on the previous night with the aforesaid weapons and assaulted the aforesaid relations. His evidence is corroborated by other injured eye witnesses to the incident so also by the owner of the field which was situated in Gat No.138 on the outskirts of the said village and by other villagers for having gone to them on the same night seeking help to rescue the members of his family from the assault made by the accused persons. There is absolutely no contradiction brought on record in his evidence vis-a-vis the FIR lodged by him.

10. It is argued that the FIR mentions the date of 30th January 1992 at about 10-10 i.e. morning of 30th January 1992 and, therefore, there is likelihood of deliberation made before giving names of the accused. According to the learned defence Advocate

complainant must not have identified the accused at the time of assault, as it was night time and the names of the accused must have been given because of the previous enmity. Secondly it is argued that he being a relation of the victims his evidence cannot be relied on. It is also argued that no specific role has been assigned to the accused as to who assaulted whom and with what weapon. Reference was made to the judgment of the Supreme Court in the case of Ladha Shamji Dhanani v. State of Gujarat reported in **AIR 1992 SC 956** in which case the Supreme Court had acquitted those accused to whom no specific role was attributed in the FIR.

11. In our view, the ratio of the above decision would not be applicable in the present case because in this case five murders had taken place in the night time and the witnesses have named all the appellants and other accused for having assaulted with weapons like axes, sickles and sticks which were seized from the place of occurrence under spot panchanama (Exh.26). In the case before the Supreme Court when specific role was assigned to some of the accused persons and not against three accused

persons, the Supreme Court gave benefit to those persons to whom specific role was not attributed in the FIR itself. That is not the case here. In this case specific role is not assigned to any of the accused except that some of the injured witnesses have deposed as to which accused had assaulted them. When five persons were murdered and three or four persons were injured, surely it must be an act of five to six persons who had been named in the FIR itself, all of whom were absconding from the date of the incident till accused no.1 could be arrested after a period of one year and accused nos.2 and 3 after a period of two years from the date of the incident.

12. Another eye witness to the incident is PW 17 Chhaya Bhosale, the sister of the complainant. She is an injured eye witness. The motive alleged against the accused is that they were annoyed because Chhaya was not given in marriage to Bigulya, the absconding accused and, therefore, accused bore grudge against them. Chhaya was married to Bhimsha who has not been examined in this case. She has also named all the six accused including the appellants

who had gone to the said field on the night of the incident with weapons and made assault on the deceased and the witnesses. She has deposed that that night they were staying for the night in the field of Waghmare. She was accompanied by her brother i.e. the complainant, father, mother, sister, grandfather and brother-in-law. According to her on the night of the incident when they had gone to sleep after night meals, the accused came there and were enquiring about Basha i.e. complainant Basu and herself. The accused were holding axes, sickles, jambiya and sticks. Accused no.1 and absconding accused had beaten her with axe as a result of which she sustained incised wounds on her forehead, above eyebrow and on her back and leg. They had also beaten her mother who sustained injuries on the head, back and leg. She has also deposed about the assault on her sister Vimalabai and her husband Gangaram and on their newly born son who died on the spot. Then she has deposed about the assault on her sister Pakshibai and Bhaga and Ganga. She has identified the accused as well as the weapons in the Court. The omission pointed out in her evidence is that she has made improvement about the accused no.1 having assaulted her and about having seen the assailants in

the torch light. It may be mentioned here that reference is made to the torch by the complainant PW 16 in the complaint also. It is different thing that said torch was not attached. We do not think that it was necessary for the police to have attached the torch referred to in the complaint itself. There was no necessity to attach the torch for the purpose of the case and deprive the surviving members of the family from the usefulness of the same. The witnesses belong to Pardhi community and must be living hand-to-mouth.

13. The other eye witness is Bhagabai who is aunt of complainant and Chhaya. She had seen four assailants on that night in the light of the torch. She had received injury on her forehead and on her back. She has also spoken about the assault on the other members of the family. In her cross-examination she has stated that torch was held by assailants. It is natural when the assailants had come all the way from a distant place in the night they would carry torch with them.

14. The next witness is PW 19 Mahadev, who is the brother of the complainant. He has deposed about the incident in question and had identified the accused and the weapons and has stated about the assault by the accused on the witnesses. He has also deposed that accused no.1 was insisting that Chhaya should be married to Bigulya, absconding accused but they had rejected the said proposal and Chhaya was instead married to Bhimsha. There are certain omissions pointed out in his evidence for not having specifically stated about the assault by particular accused on certain injured persons or the victims.

15. The next witness is Kasturbai, PW 20 who had turned hostile being the wife of accused no.1. According to her police statement and the statement recorded by the Special Judicial Magistrate she was halting with the complainant in the said field on the night of the incident. After the accused had severely assaulted the victims and the witnesses she was taken by accused no.1 along with him. Her statement was recorded very late i.e. in June 1992 but she having turned hostile her evidence is of no assistance to the prosecution.

16. The evidence of the complainant is thus corroborated not only by the complaint but also by injured and other eye witnesses. The fact that the witnesses are related to the victims cannot affect their credibility. No doubt certain omissions have been pointed out but Court cannot ignore that when the incident took place in the night in an open field at about 11 p.m. the witnesses had gone to sleep and six persons armed with deadly weapons started attacking them causing death of five persons and injuring others seriously. In those circumstances the witnesses are not expected to give the details as to which accused was armed with what weapon and who assaulted whom. The reliance by learned defence Advocate on the recent judgment of the Supreme Court in the case of Gangadhar Behera v. State of Orissa reported in **(2002) 8 SCC 381** is of no assistance to the accused. In that case after considering the earlier judgments of the Supreme Court it is held that the fact that the witnesses were related would not affect their credibility and the Court has to find out which portion of their evidence is reliable and which portion is not reliable as the doctrine, *falsus in uno, falsus in omnibus,* is not applicable

in our country.

17. The evidence of eye witnesses is to a certain extent corroborated by the villagers including the owner of the land in question. PW 4 Shivaji Waghmare, owner of the land bearing Gat No.138, though turned hostile, some portion of his evidence could be usefully considered which supports the prosecution case especially the version of the complainant and also other eye witnesses. He has deposed that he possessed the agricultural land in village Khanapur bearing Gat No.138 which belongs to him. He has produced at Exhibit 29 the 7/12 extract in respect of the said land to prove his ownership. He has deposed that Pardhi community was residing in his field. When he was coming from another field he saw Pardhis along with family members had halted in his gat no.138. When questioned they told him that they wanted to make halt in the said field only for that night and they would leave the field next morning. The said land adjoins Gavthan and he was himself residing in the adjoining village of Khanapur. When he was sleeping after night meals on the night of the incident Pardhi persons who had

halted in his field had gone to the vasti saying that some other Pardhi persons were beating them and sought the help of the villagers. But the witness showed his inability to help them and told them to go to the Police Patil. Next morning he had gone to the said field to find dead bodies lying in his field. He has deposed that complainant Basu had halted in his field on that night and Basu accompanied by Rama and Bhimsha told him that some persons from Pardhi community had beaten them. He however denied that names of the assailants were told to him and, therefore, he was declared hostile. In any event his evidence supports the prosecution case and the version of the complainant that on the night of the incident complainant and other persons of Pardhi community were residing in his field and when he had gone to sleep at about 10-30 p.m. or so Basu and others had gone to his house and complained that other members of Pardhi community were assaulting his family members and asked for help but he had asked him to go to Police Patil.

18. Another witness is PW 6 Malkavate who is also a villager from Khanapur. He has deposed that

on the night of the incident when he was sleeping in his house after dinner he heard the voice of Pardhi persons crying. Police Patil and other villagers had also got up and the ladies and men from the Pardhi community were crying and saying that some persons had beaten them and were asking for help but neither he nor any other villager including Police Patil went with them as it was night time. Next day morning he along with Police Patil and other villagers had gone to the field of Shivaji Waghmare and had seen dead bodies lying in the field.

19. The evidence of this witness and also of Shivaji Waghmare PW 4 is criticized on the ground that they had spoken of having seen five dead bodies in the field. First of all when the witnesses were giving evidence after a lapse of three years it was possible to forget how many dead bodies were there in the field, four or five. Secondly the fifth injured person Pakshibai who was seriously injured must be unconscious that time. She ultimately died following morning in the hospital. The witnesses must have taken her as dead and, therefore, they might have said that there were five dead persons instead of

saying four dead persons. One more villager by name Daryappa Birajdar had been examined as PW 7 but he had turned hostile and had not supported the prosecution case and his earlier police statement which was put to him.

20. Thus the evidence of the complainant and other eye witnesses is corroborated to a certain extent by these two villagers PW 4 Shivaji Waghmare, the owner of the field where the incident had taken place and PW 6 Malkavate who support the version of the complainant that complainant had been to the village in the night between 10-30 and 11 O'clock and told them that other members of the Pardhi community were assaulting them and had sought their help and when the next morning they went there they found dead bodies lying in the said field. Their version also supports the case of the prosecution and other eye witnesses that on the night of the incident the witnesses had made a halt in the field of Waghmare.

21. Then there is medical evidence which also supports the version of the eye witnesses as to the

assault made on them with weapons like axes, sickles and sticks. PW 14 is the Medical Officer Dr.Vijay Upase who was attached to Primary Health Centre, Karajgi on the date of the incident. He had conducted autopsy on 30th January 1992 on the dead bodies of Vimalabai, Shantabai, Gangaram and newly born male child. He had examined the injured persons i.e. Chhaya PW 17 and Bhagabai PW 18 and Ganpat who was not examined. He had also examined Pakshibai who was taken to the said Health Centre before her death who subsequently died in Civil Hospital, Solapur.

22. As per his evidence deceased Vimalabai had received incised wound 1/2" above left eye-brow 1"x1" which was scalp deep. He also noticed fracture of left side frontal bone. Because of the incised wound above left eye brow there was internal injury to the brain which caused laceration of the brain. According to him the probable cause of death of Vimalabai was due to shock due to injury to the brain. The said injury, according to him, was possible if she was assaulted with a sickle. The said injury was also sufficient to cause her death in the ordinary course of nature.

23. The Medical Officer found seven external injuries on the person of Shantabai which were in the nature of incised wounds mostly on the head and other parts of the body. They are as follows:

1. Incised wound over Rt. temporal region above Rt. ear, sized 2 1/2 x 3/4th", scalp deep.

2. Incised wound over 1" above left eyebrow. 2" x 1/2" scalp deep, frontal bone.

3. Incised wound 1/2" above wound 1" x 1/2" scalp deep.

4. Incised wound over left little finger upper part and back, 3/4" x 1/4".

5. C.L.W. over Rt. lower leg 3 in number, 1" x 1/2" in length, 1/4" in depth.

6. Incised wound over 1/2" above wound. 1 1/2" x 1/2".

7. Incised wound 1/2" above wound, 1/2" x 1/4".

On internal examination he found fracture of left frontal bone and right temporal bone and laceration of brain. The injuries were ante mortem. The internal injuries corresponded to the external injuries and the probable cause of death was due to injury to brain. According to the Medical Officer

those injuries were possible if the victim was beaten with stick and sickle.

24. As regards Gangaram doctor had noticed following seven injuries:

1. Incised wound over left chest, 2" x 1".

2. Incised wound 1/2" below injury No. 1, 3/4" x 1/4".

3. Incised wound over above 1" above left ear over temporal region, 2 1/2" x 1/2" scalp deep.

4. Incised wound 1" above injury No.3, 2 1/2" x 1/2" scalp deep.

5. Contusion over left side of forehead, 3" x 1/2".

6. C.L.W. over between two eye-brows.

7. Fracture of left temporal region.

On internal examination he found fracture of left temporal bone and laceration to brain. The injuries were ante mortem and the cause of death was shock due to injury to the brain.

25. The newly born child had following five injuries:

1. Contusion over occipital region 3" x 1/2".

2. Contusion over both soles 1" x 1/2" in length, 1/4" in breadth.

3. Contusion over umblical region 3" x 1/2".

4. All parts of body were cynosed.

5. Fracture of occipital bone.

On internal examination he found fracture of occipital bone 3" x 1/4". The injuries were ante mortem and the cause of death of the child was due to shock due to injury to brain.

26. According to the Medical Officer PW 17 Chhaya had received following two injuries:

1. CLW over forehead 2" x 1/2" scalp deep.

2. CLW over forehead above left eye, 1 1/2" x 1/2", scalp deep.

Those injuries are stated to be grievous and could be caused by hard and blunt object like stick and the butt end of the axe.

27. According to Medical Officer PW 18 Bhaguvva i.e. Bhagabai had received following three injuries:

1. CLW near left eye 2" 1/2 scalp deep.

2. Contusion on back left side, 7"x2".

3. Contusion over left side of chest, outer part 6 1/2" x 1".

Those injuries could be caused by hard and blunt object. Her injuries were possible if beaten with a stick.

28. He had also examined injured Ganpat who was not examined in the Court. He had received following two injuries:

1. CLW over forehead 3" x 1/2" scalp deep.

2. Incised wound over Rt. palm front between index and middle finger upto base of thumb.

The injury no.1 could be caused by hard and blunt object while injury no.2 could be caused by sharp cutting instrument. Injury no.2 was found to be grievous.

29. He has also deposed that he had examined Pakshibai in the said Primary Health Centre who was having incised wound over right forehead 1 1/2" x 1/2", scalp deep, bleeding through nose. the said injury could be caused by sharp cutting instrument within 24 hours. It was a grievous injury hence the patient was referred to Civil Hospital, Solapur.

30. Pakshibai ultimately died in Civil Hospital, Solapur. The autopsy on her dead body was conducted by Dr.Ashok Kanaki, PW 8. He found following five external injuries on her body:

1. Sutured wound on the scalp left parietal region 1" length oblique.

2. Sutured wound over Rt. parietal region near vertex 1" length anterior posterior.

3. Two abrasions on the scalp at vertex 1/2" x 1/2" brown each.

4. Sutured wound above Rt. eye-brow 3/4th" length vertical with abrasions 2 1/2" 2" brown, interrupted with swelling on the forehead.

5. Abrasion on lateral aspect of Rt. arm 1/2" x 1/8th" brown transverse.

On internal examination he found following six injuries:

1. Haematoma at frontal both parietal Rt. temporal region under the scalp.

2. Depressed fracture frontal bone at Rt. side with loose piece of bone 2" x 1".

3. Fracture Rt. parietal bone.

4. Fracture Rt. anterior cranial fossa.

5. Subdural haematoma all over brain.

6. Rt. Frontal lobe of cerebrum lacerated sloughed all other internal organs were pale.

According to the Medical Officer the probable cause of death of Pakshibai was shock due to fracture of skull with subdural haematoma with injury to brain. He has deposed that injury nos.1 to 4 of Pakshibai could be caused by weapons like sticks and axe, the

muddemal articles shown to him.

31. There is one more Medical Officer examined on behalf of the prosecution. He is Dr.Godale, PW 15, the Medical Officer from Civil Hospital, Solapur. On 30th January 1992 upto 2.15 p.m. he had examined PW 18 Bhagavati who was also examined by PW 14 in the Primary Health Centre, Karajgi. He had found the following three external injuries on her person:

1. CLW over left side of eyebrow extending upto left maxilla, 6 cm. x 2 cm., bone deep.

2. Contusion over left side of chest anteriorly 6 cm x 2 cm. reddish in colour.

3. Contusion over left lower 3rd forearm, diffused.

According to him injury no.2 was grievous which was caused by hard and blunt object like stick and butt end of axe and the age of injuries was within 24 hours. X-ray of the chest of PW 18 was taken. The X-ray report revealed fracture of 5th rib in midaxillary on left side. Similarly rib nos.6, 7 and 8 were found fractured on left posteriorly aspect.

32. He had also examined Ganpat who had received following three injuries on his person:

1. Sutured wound on forehead oblique in nature, 4 x 2 cm.

2. C.L.W. on web of rt. hand between thumb and index finger, 6 cm x 2 cm. muscle deep.

3. Contusion over Rt. and diffused.

Injury Nos.2 and 3 could be caused by hard and blunt object like stick and butt end of axe.

33. Chhaya, PW 17 was also referred to him and he found following three injuries on her person:

1. Sutured wound on forehead 4 cm. in length.

2. Sutured wound on left temporal region, 4 cm. in length.

3. Contusion on face, diffused.

Those injuries could be caused by hard and blunt object like stick.

34. The aforesaid medical evidence led by the prosecution thus corroborates the version of the eye witnesses that the victims and the injured were

assaulted with weapons like axes, sickles and sticks. Those injuries were caused within 24 hours before they were examined by the Medical Officers. It means they must have been assaulted on the previous night as stated by the witnesses.

35. The aforesaid evidence is further supported by the spot panchanama (Exh.26). Immediately after registration of the crime on the basis of the FIR lodged by the complainant PW 16 Basu the Police Officer had gone and drawn the scene of offence panchanama following morning. At the place of offence apart from the dead bodies and injured persons, six weapons consisting of two axes, two sickles and two sticks were attached. Both the axes and both the sickles as per the panchanama were stained with blood but no blood was found on the sticks. Even CA report (Exh.22) reveals that both the axes and both the sickles were stained with blood of group "B" which was also found on the clothes of the deceased and the injured. No doubt as per the CA reports (Exh.20 and 21) the blood of all the three appellants is also shown to be of Group "B" but that has absolutely no significance because it is not the

case of the accused that blood on the said weapons was of the accused persons who obviously had no injuries and they were arrested after one and two years from the date of the incident. Since they were arrested so late their clothes were not attached. The absence of any blood on the two sticks, one of which was wooden stick and another bamboo stick, cannot belie the prosecution case. The absence of blood on the sticks cannot mean that no assault was made with sticks. Even if the assault is made with stick which can only cause contusion or CLW, there is scarce possibility of finding of the blood stains on the sticks. Thus finding of the aforesaid six weapons also supports the version of the eye witnesses which is also mentioned in the complaint that the accused had come to the place of offence armed with weapons like axes, sickles and sticks. Merely because jambiya was not found at the place of offence, though according to some prosecution witnesses the accused were having jambiyas with them, cannot falsify the evidence of the eye witnesses. Either the witnesses had made a mistake in seeing jambiyas in the hands of some of the accused or possibly the accused carrying jambiya in his hand might have taken it away while leaving the place of

incident after the assault.

36. The learned defence Advocate has argued that the weapons were not recovered at the instance of the accused and the weapons which were found at the place of incident cannot be said necessarily to belong to the accused. But that does not falsify or demolish the case of the prosecution or the eye witnesses that the accused had assaulted the deceased and the witnesses with those weapons. The names of the assailants have been mentioned in the complaint which was lodged immediately after the incident and all the witnesses had also stated about holding of those weapons by the assailants. The question as to why the accused chose to leave the weapons at the place of incident can be answered by the accused themselves. One reason which we can conceive of is that if the blood stained weapons had been carried by them in their hands anybody who had seen them while returning from the place of incident that night would have necessarily drawn an inference that they were returning after committing the murders. In any event the names of the accused were mentioned in the FIR and by the eye witnesses who were knowing the

accused. The weapons having been left by the accused at the place of incident itself, there could not have been recovery of weapons at the instance of the accused who were arrested one or two years after the date of incident.

37. The last circumstance which goes against the accused is that they were absconding for a period of pretty long time. Accused no.1 was arrested in February 1993 i.e. more than one year after the incident in question that also not from his own village but from the adjoining Sangli district. Accused nos.2 and 3 were arrested more than two years after the date of incident i.e. on 27/2/1994 from village Donaj. Accused no.1 was the ordinary resident of village Sidhapur but he was not traced there for a period of one year and was arrested in Dist. Sangli. The prosecution had led the evidence of PW 9 Avinash Mungashe who was resident of village Borale of which accused nos.2 and 3 were also ordinary residents. He had however turned hostile and did not support his statement made to the police. Similarly PW 10 Sarpanch of village Sidhapur, of which according to the prosecution case accused no.1

was ordinary resident, had turned hostile and has not supported the prosecution case. However, PW 11 Ganpati Randive, Kotwal of village Borale has deposed that accused nos.1 to 3 and the absconding accused were residents of village Borale and since the date of incident no Pardhi person was residing in the said village. He has also deposed that since the date of incident in question accused nos.1 to 3 were not residing in Borale though according to him they were residents of that village. The witness was born in that village and was working as Kotwal of the said village for previous 30 years.

38. Initially the matter was investigated by PSI Gaikwad. He not being able to trace the accused the higher officer was directed to take charge of the said case and that is how PW 21 Dy.S.P. Mutyar took over the investigation since June 1992. He has deposed that since all the accused persons were absconding he had given instructions to all the police officers working under him to search the accused. On 4/2/1993 he had received information that police at Jat had arrested accused no.1 under Section 41 of Cr.P.C. and thereafter he took his

custody under transfer warrant dated 6/2/1993. So far as complaint at Exhibit 58 is concerned the same was recorded by PW 23 PSI Gaikwad who has supported the version of the complainant and also the recovery of the muddemal weapons from the place of incident which were seized under spot panchanama Exh.26. He has probably through oversight in his deposition stated about attachment of one sickle instead of two from the place of incident but that slip of memory must be due to the passage of time and in such circumstances the Court has to go by documentary evidence i.e. spot panchanama (Exh.26) which states about the recovery of two axes, two sickles and two sticks from the place of incident.

39. It is argued on behalf of the accused that day-to-day account is not given about the efforts made by the police for arrest of the accused persons. Some credit must be given to the police officers. When the complaint was lodged immediately on the following morning mentioning the names of the six accused persons, the police cannot be expected to be so indolent not to take any steps to find out the whereabouts of the accused persons. Since the

accused were absconding, PW 21 Dy.S.P. Mutyar had given instructions to all the police officers working under him to search the accused. No police officer would sit quiet and not take any steps to search the accused though their names were mentioned in a matter of this kind where five murders had taken place. It is argued that until June 1992 when the said Dy.S.P. took over the investigation no effort was made to search the accused. That cannot be true. After all the accused belong to Pardhi community and one cannot be oblivious to the fact that it would be difficult for the police to trace the members of Pardhi community who do not possess immovable property nor their residential houses are permanent. Since accused were not traced until the end of May 1992 the higher officer was directed to take over the investigation in the beginning of June 1992. Even the complainant who also belonged to Pardhi community could not assist the police in tracing the accused persons who were ultimately traced from different villages. Accused no.1 was traced in Sangli District and accused nos.2 and 3 were arrested in Solapur District. The fact that accused were absconding is a circumstance which also goes against the accused.

40. The defence Advocate has also argued that copy of the FIR was not sent to the Magistrate on the same day but on the next day. It would have been better if the copy of the FIR had been sent to the Magistrate on the same day but only because it was sent to the Magistrate on the next day no adverse inference could be drawn because there is nothing on record to show that FIR was prepared not on 30th January 1992 but on 31st January 1992 and the names of the accused were falsely given on the basis of the previous enmity as the real assailants were not known.

41. It is also argued that since the occurrence had taken place in the night in the absence of street lights it must not have been possible for the witnesses to see and identify the accused persons. In our view even assuming that there was no torch light in which the accused could be seen or identified by the witnesses, since the assailants were known to the witnesses it was not difficult to identify them even during night time. One cannot forget that they were sleeping in the open field and the incident had taken place in the open field and

assuming that it was dark night even then light is emitted from the skies which is sufficient to identify and recognise the known persons. PW 17 Chhaya has also stated that accused were enquiring about the complainant Basu and Chhaya and, therefore, from their voice also they could have been identified. It is difficult to say that because the assailants could not be seen the witnesses would go out of their way to implicate accused falsely on the ground of previous enmity.

42. Thus we find that there is evidence of eye witnesses including injured eye witnesses who had without any delay implicated and named all these three appellants. The prosecution has also led the evidence of motive for the appellants accused to assault the victims and the witnesses. The fact that the accused were absconding from the date of the incident for a period of one and two years furnishes additional circumstance which lends support to the prosecution case against the accused. The versions of the eye witnesses, as stated earlier, has been corroborated about the incident in question by other evidence on record including the immediate FIR lodged

by the complainant naming all the appellants.

43. Since the accused had committed murder of five persons and also caused grievous hurts to some of the witnesses they were rightly convicted for the offence under Section 302 as well as for offence under Section 326 of IPC. There is no sufficient evidence on record to convict the appellants for offence under Sections 504 and 506 of IPC. Of course, the trial Court has not imposed separate sentence for the said offences nor even for offence under Section 326 and Sections 147, 148 of IPC. Since the accused were more than five in number the trial Court has rightly convicted them for offences under Sections 147, 148 and for offences under Section 302 and 326 read with Section 149 of IPC. Mr.Halli, however, contended that application of Section 149 was not proper. In that respect he placed reliance on the judgment of the Supreme Court in the case of Chittarmal v. State of Rajasthan reported in **(2003) 2 SCC 266**. In that case the Supreme Court has pointed out distinction and similarity between common intention and common object and has held that even if there is no charge under

Section 34 of IPC the same could be applied substituting the charge under Section 149 of IPC. It cannot be said that the accused had no common object or common intention to kill the victims and / or cause grievous hurt to the witnesses. The fact that the accused were armed with deadly weapons and gone to the place where victims and witnesses were sleeping during night time and the consequent murders of helpless victims like ladies and newly born child proves the common object and the common intention with which they had gone to the place of incident. Since five murders have taken place and witnesses had been grievously injured, the trial Court could have imposed separate sentence even for offence under Section 326 of IPC.

44. In our view, the trial Court has rightly come to the conclusion that the prosecution has proved the offence of murder and grievous hurt beyond reasonable doubt against the appellants-accused. We, therefore, see no reason to interfere in the order of conviction and sentence recorded against the accused except the conviction for offences under Sections 504 and 506 of IPC in respect of which there is no

evidence on record.

45. In the result, we confirm the order of conviction and sentence recorded by the 3rd Addl. Sessions Judge, Solapur in Sessions Case No.150 of 1993 for offence under Section 302 read with Section 149 of IPC and the order of conviction for offences under Sections 147, 148 and 326 of IPC. The appellants-accused are, however acquitted of the offences under Sections 504 and 506 of IPC. Except for the above modification the appeal is dismissed. The appellants-accused shall surrender to their bail bonds forthwith.

(S.S.PARKAR,J.)

(ANOOP V.MOHTA,J.)